IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-613

ALTON R. MOSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on August 16, 1979. A petition for rehearing was denied on September 20, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals is not yet reported; it is set forth in the appendix *infra*. It affirmed a judgment of conviction of Petitioner for violation of 26 U.S.C. §7205 and 18 U.S.C. §2. Petitioner was tried in the District Court by a jury and there is no opinion of the trial court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on September 14, 1979. A petition for rehearing and/or suggestion for hearing en banc, timely filed, was denied on September 20, 1979.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment permits a criminal conviction for pure speech where Petitioner's public speech is unaccompanied by any acts whatsoever and whether the Court below accordingly misapplied *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

2. Whether Petitioner's constitutional right to trial by jury and the presumption of innocence was dissipated by the trial judge's improper response to the jury's request for reinstruction on intent with respect to what consideration the jury should give to Petitioner's admonition to his listeners to obey the law.

3. Whether a charge of false and fraudulently hindering the sovereign in the collection of revenue and/or the nature of the punishment made the crime herein an infamous crime compelling indictment by grand jury under the Fifth Amendment.

4. Whether due process was denied in the government's intimidation of Petitioner's witnesses, the government's charging Petitioner in five counts for the same offense, and the Court of Appeals issuance of the mandate prematurely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First, Fifth, and Sixth Amendments to the Constitution of the United States.

The statutory provisions involved are 28 U.S.C. §7205; 18 U.S.C. §2; Appendix *infra.*

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial on charges of knowingly aiding and abetting the willful filing of fraudulent withholding forms by others. Petitioner is an itinerant tax protester who travels about the country making speeches to groups of others of like philosophy. In late February or early March 1978 when Petitioner arrived in the vicinity of Grand Island, Nebraska, he was interviewed on a radio station and responded to questions called in by the listening audience. Thereafter, on March 8, 1978, Petitioner addressed an audience which appeared after learning from earlier announcements that he would be speaking publicly. One Gronewold attended the speech and tape recorded Petitioner's remarks, at least in part. Sometime thereafter Gronewold published the taped remarks through repeated playings for others, including some co-workers. The tape recording was sometimes referred to during the trial as the Gronewold tape. After listening to the Gronewold tape, Gronewold and four co-employees, including the principal operating officer of their corporate employer subsequently filled out new withholding statements, form W-4's. Gronewold and two of his co-workers calculated and then claimed sufficient allowances or exemptions to exceed their gross earnings. A third co-worker, the principal operating officer of the

employer, filled out a W-4 claiming that he was exempt from withholding taxes. Up to, and including, the date Gronewold and his three co-workers filled out the withholding forms, Petitioner had never met or talked to them. Neither had any of them sought or received any advice from Petitioner. Petitioner did not know their identity and had no knowledge of their existence or indeed what exemptions they were lawfully entitled to claim. Further, Petitioner was unaware that the W-4's had been filled out by Gronewold and his three co-workers; and Petitioner was unaware of what number of allowances each had claimed.

Approximately one month after Gronewold and his three co-workers had filled out and submitted the W-4's, one of them, the principal operating officer of the employer, invited Petitioner to the employer's office. There, Petitioner learned for the first time that the W-4's had been filed my Gronewold and his three co-workers, including the principal operating officer of the employer. Subsequent to that meeting, another co-worker, one Sanne filed a new W-4 claiming that he was exempt from withholding taxes. He testified that he did so despite being advised by Petitioner that he was not eligible for such an exemption unless he had no tax liability for the prior year and did not anticipate any for the next year.

Subsequently, Gronewold and his four co-workers were named in five criminal informations. Each information contained two counts. The first count of each information charged a single co-worker with willful filing false and fraudulent withholding forms. The second count of each of the five informations charged Petitioner with a violation of the same substantive statute the co-workers were charged under, which prohibits willful filing false

and fraudulent withholding forms. Petitioner was charged under the provisions of 18 U.S.C. §2 making those who aid or abet punishable as principals. Each of the co-workers was permitted to plead guilty and fined $100.00 in exchange for a promise to testify against Petitioner. Petitioner, upon conviction, was given the maximum sentence of one year's imprisonment on each of the five informations. Pursuant to the conditions of his sentence, Petitioner will not be eligible for parole.

Several of the co-workers stated that they had heard Petitioner on the radio prior to listening to the tape published by Gronewold. Each of the co-workers in testifying at Petitioner's trial was permitted to answer a leading question such as, "Were you induced to file the false and fraudulent withholding forms by [Petitioner]?" Each was permitted to answer, "Yes."

Some witnesses who appeared to testify for Petitioner were intimidated when they attempted to take the witness stand and counsel for the government insisted that he "had a file" on such witness, was about to bring charges against the witness and that the witness would probably be cross-examined about those charges and in all probability lose his right to the protection of the Fifth Amendment with respect to the charges counsel for the government had in mind. The trial judge participated in the colloquy.

Petitioner admonished all of his audiences not to violate the law, and he urged each of them to make personal inquiry and study into the various constitutional, statutory, and regulatory provisions he discussed and alluded to. Petitioner's request for instructions pertaining to his innocence because of lack of intent in the above connection were denied. Subsequently, after the jury had been

charged and sequestered, and had commenced deliberation, the jury requested reinstruction regarding how the jurors should view Petitioner's intent with respect to his admonitions as stated above. The trial judge, in responding to and denying the jury's request for reinstruction, significantly confused the jury with respect to the presumption of innocence, *inter alia*.

REASONS FOR GRANTING THE WRIT

I.

Court of Appeals Decision Below Conflicts With This Court's Ruling in *Brandenburg v. Ohio*, 395 U.S. 444 Raising Critical Constitutional Questions Under the Free Speech Provisions of the First Amendment Concerning a Criminal Conviction and Incarceration for Public Speaking.

Petitioner, an itinerant tax protester and public speaker, was convicted on charges of aiding and abetting the willful filing of fraudulent withholding tax forms by others. Petitioner apparently is one of the very few individuals ever criminally convicted and (presently) incarcerated for public speaking. Petitioner's speaking was unaccompanied by any overt acts to assist or aid or abet the filing of fraudulent tax forms.[1]

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[1] Recent noteworthy criminal speech cases have had *additional* elements involving symbolic speech or conspiracy allegations or overt acts alleged, *e.g., United States v. O'Brien,* 391 U.S. 367 (1968) (draft card burning); *United States v. Spock,* 416 F.2d 165 (1st Cir. 1969) (speech and conspiracy to interfere with war effort); *United States v. Dellinger,* 472 F.2d 340 (7th Cir. 1972), *cert. denied,* 410 U.S. 970 (1973) (Chicago 7 conspiracy trial under 1968 federal anti-riot legislation, 18 U.S.C. §§2101-2102 and 18 U.S.C. §231). Here, however, Petitioner was convicted for pure speech — indeed public speaking including radio talk show replies — without any such additional factors.

The opinion below through Chief Judge Markey, United States Court of Customs and Patent Appeals, sitting by designation, summarily rejected Petitioner's free speech argument relying exclusively on *United States v. Buttorff,* 572 F.2d 619 (8th Cir. 1978). Petitioner respectfully submits that *Buttorff* and the opinion below constitute appeal court decisions directly in conflict with this Court's decision in *Brandenburg*. The Eighth Circuit in *Buttorff* in a three sentence analysis merely stated the speech went beyond mere advocacy, explained how to avoid withholding, and incited several individuals to activity that violated federal law and thus is not protected by the First Amendment. *Brandenburg* requires a much more thorough analysis of the facts and law and judicial scrutiny conscientiously directed toward over protecting rather than under protecting free speech. The Court below apparently did not accept the First Amendment principle that wrongful limitation of speech is *a priori* more serious than erroneous over protection of speech.

The decision below with its hurried analysis would effectively subject a speaker to strict liability for unlawful reactions of one's audience. Just as it is impermissible to expect a publisher to verify the truth of all his published factual statements and unreasonable to require a book seller to familiarize himself with the content of every book in his inventory, it is beyond the pale of the First Amendment to force a speaker to predict the possible reaction of one's often large and diverse audience. And, in addition, "a function of free speech under our system of government is to invite dispute." *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949). Knowing that a speaker may be liable in the event that his instructions or urgings are accepted, a speaker may forego speaking entirely or, at the least, temper remarks to the point of negating their

very effectiveness. To prevent this irreparable harm, this Court in *Brandenburg* included an intent requirement.[2]

This Court in *Brandenburg* added a further measure of constitutional protection supplementing the intent requirement with the second prong — "likely to incite or produce such action [law violation]", 395 U.S. at 447. This second prong permits certain utterances of admittedly inflammatory nature to remain protected. The most evident attempts to incite will not shed their constitutional protection unless it is demonstrated the language is likely to succeed. No such showing or analysis was made by the Court below. Conclusory statements by courts are constitutionally impermissible in this context.[3] Because peaceful persuasion has unfortunately ended on occasion in violence and because the most virulent diatribes have met apathetic responses, *Brandenburg* requires careful analysis and specific proof with regard to speech producing imminent lawless action *and* likelihood of such.

A further reason for this Court to exercise its discretionary authority and review this case is that other courts have misapplied the decision in *United States v. O'Brien,* 391 U.S. 367 (1968), decided one year before *Brandenburg*. The gap between *O'Brien* and *Brandenburg* could

[2] *Brandenburg* was following the earlier teachings of Mr. Justice Brennan in *Speiser v. Randall,* 357 U.S. 513 (1958):

> "Where the transcendent value of speech is involved, due process certainly requires in the circumstances . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." *Id.* at 525-26.

[3] The asserted lack of analysis by the Eighth Circuit in *Buttorff* is further supported by the fact that opinion relied on a 1917 opinion by Judge Learned Hand in *Masses Publishing v. Patten,* 244 F. 535 (2d Cir. 1917). That opinion was a preview to *Whitney v. California,* 274 U.S. 357 (1927); however, *Brandenburg* concluded *Whitney* "cannot be supported, and that decision is therefore overruled." 395 U.S. at 449.

now be scrutinized and clarified.[4] The same time period from *O'Brien* in 1968 and *Brandenburg* in 1969 has seen the need to resolve free speech/criminal issues emanating from legislation such as the 1968 federal anti-riot legislation.[5] Thus far, the lower courts have sustained its facial constitutionality, while being circumspect in its application, *e.g., National Mobilization Committee to End the War v. Foran,* 411 F.2d 934 (7th Cir. 1969); *In re Shead,* 302 F.Supp. 560 (N.D. Cal. 1969), *aff'd on other grounds sub nom., Carter v. United States,* 417 F.2d 384 (9th Cir. 1969), *cert. denied,* 399 U.S. 935 (1970). There is a need to discuss and settle the difficult and disturbing constitutional questions and not to sanction the superficial analysis by the court below which trivialized the First Amendment issue in an opinion that has all the deceptive simplicity and superficial force that can usually be achieved by begging the question.

The reason free speech cases have been of such importance to this country and this Court is the time-honored, acknowledged value of free speech as a preferred value within the Bill of Rights. This fact was first articulated by Mr. Justice Rutledge in *Thomas v. Collins,* 323 U.S. 516, 529-30 (1945) and the recognition that when First

[4] *O'Brien* has been criticized even by those First Amendment commentators who favor a balancing test of mere reasonableness; a test itself subject to controversy. *E.g.,* Emerson, *Colonial Intentions and Current Realities of the First Amendment,* 125 U.Pa.L.Rev. 737, 749 (1977) and the related criticism of Judge Hastie that the free speech cases of recent vintage tend to be "mere declarations of negative postulates" and "dogmatic characterization of some types of talk as beyond the pale of the free speech clause" with "no conceptual boundary and [which] contributes little to an effort to understand what the free speech clause protectively fences in, or why." Hastie, *Free Speech: Contrasting Constitutional Concepts and Their Consequences,* 9 Harv. Civ.Rts.Civ.Lib.L.Rev. 428, 430 (1974).

[5] 18 U.S.C. §§2101-2102 and 18 U.S.C. §231.

Amendment values are involved, the otherwise permissible prohibitions which government might impose are to be examined in a different context and measured by more critical standards. This principle is the essence of the preferred position of the First Amendment. *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 Harv.L.Rev. 1 (1965). *See also* Cahn, *The Firstness of the First Amendment,* 65 Yale L.J. 464 (1956).

The opinion below conflicts with *Brandenburg* or, if not so in conflict, the free speech issues are of such far-reaching importance and issues unresolved and undecided so that they should now be faced by this highest Court. In either event, this Court should grant certiorari.

II.

Trial Court Below in Response to Jury's Request for Reinstruction on Intent/Presumption of Innocence Issue Failed to Answer Jury's Inquiry and Accordingly Trial Court Misapplied This Court's Opinion of Last Term in *Sandstrom* v. *Montana,* 439 U.S. — (June 18, 1979).

During the second day of its deliberations, the jury sent a note to the trial judge requesting instruction from the Court concerning an issue not explicitly covered in the Court's original charge to the jury.

The Court told the jury it would *not* answer the question and referred the jury to the original instructions and the evidence in the case. The jury's question to the Court directly referred to facts demonstrating Petitioner's lack of specific intent and facts favorable to the defense concerning the Petitioner's state of mind.

The trial court's failure to more fully respond to the jury's inquiry denied Petitioner his right to a fair trial. The Court had a distinct constitutional obligation to attempt to answer the jury's question and remove any confusion on the applicable law. *Bollenbach v. United States,* 326 U.S. 607 (1946); *United States v. Bolden,* 514 F.2d 1301 (D.C. Cir. 1975). *See also* §5.3(a), A.B.A. Project on Standards for Criminal Justice, *Standards Relating to Trial By Jury.*

The trial court's response to the jury's request, at the least, confused the jury as to the applicable law. Where a jury is not instructed in an understandable fashion, it cannot perform its constitutional function. At worst, the trial court's response, "I have decided not to answer your question," indicated to the jurors there was a "yes" or "no" answer to its question and directed the jury to resolve an issue outside their authority. It left the jury in a position of guessing as to the applicable law, thus removing Petitioner's right to be convicted only upon proof beyond a reasonable doubt, overcoming the constitutional presumption of innocence. *Sandstrom v. Montana, supra,* and *Taylor v. Kentucky,* 436 U.S. 478 (1978).

This issue is a significant constitutional criminal justice issue involving again the presumption of innocence. The important nature of this issue was recognized last June by this Court in *Sandstrom.* The effect of the Court of Appeals decision below, if unreversed, infringes directly on the Bill of Rights and makes this case a particularly appropriate one for the exercise of this Court's discretionary jurisdiction.

III.

This Court Should Grant Certiorari as the Court Below Denied Petitioner His Fifth Amendment Right to Indictment By a Grand Jury and the Lower Court's Ratio Decidendi Misapplied This Court's Earlier Decisions.

The Fifth Amendment guarantees a Grand Jury indictment "for a capital, or otherwise infamous crime." Petitioner was charged by *information* under Rule 7(a), Federal Rules of Criminal Procedure, rather than grand jury indictment. Petitioner timely challenged this issue at his arraignment and in a subsequent written motion.

Certiorari should now be taken to re-examine what constitutes an "infamous crime" for Fifth Amendment purposes. Indeed, this Court almost 100 years ago noted this infamous crime concept should be continually re-examined. *Ex parte Wilson,* 114 U.S. 417 (1885).

Despite this Court's admonition to continually re-examine and re-define "infamous crimes" for Fifth Amendment purposes, the court below merely followed the old case law concerning "hard labor" and "penitentiaries". Other federal courts, when confronted with the question of whether an indictment is required, have begun the necessary continuing re-examination *Wilson* requires. *See, e.g., United States v. Harvin,* 445 F.2d 675, 699 (D.C. Cir. 1971) (dissent); *United States v. Neve,* 357 F.Supp. 1 (W.D. Wis. 1973), *aff'd,* 492 F.2d 465 (7th Cir. 1974).

In *United States v. Moreland,* 258 U.S. 433 (1922), this Court found a crime calling for a six month sentence at hard labor in a house of correction to be an infamous crime for Fifth Amendment purposes. Again, emphasis

was placed upon the need to reassess the definition of an infamous crime as times change. The reasoning process involved in defining infamous crimes has also been used by this Court in defining cruel and unusual punishment under the Eighth Amendment where the Court has referred to "evolving standards of decency." *Trop v. Dulles,* 356 U.S. 86, 101 (1958). *See also, Weems v. United States,* 217 U.S. 349 (1910).

A similar reasoning process was used in *United States v. Sanchez-Meza,* 547 F.2d 461 (9th Cir. 1976). In that case, the court went beyond the mere designation of a particular crime as a petty offense and found the misdemeanor conspiracy charge, with a six month maximum sentence, to be a serious crime so as to afford defendant his Fifth Amendment right to trial by jury.

Following this analysis, one must focus on the significant changes in the modern history of federal penology. The first change relates to the concept of hard labor. By the late nineteenth century, imprisonment and hard labor had replaced corporal punishment which had previously been designated as infamous. This concept is recognized in *Wilson* and *Moreland.* Subsequently, a substantial change in sentencing has taken place removing the ability of the sentencing judge to impose hard labor and conferring such power on the Attorney General. Since 1948, the district courts have not been permitted to impose hard labor and it is not associated with particular crimes. Hard labor is available to prison administrators as one part of the "individualized system of discipline, care, and treatment" that Congress has sought to provide inmates in an integrated federal prison system. 18 U.S.C. §4081.

Accordingly, whether a convict is subjected to prison life and routine that could be characterized as hard labor

depends, *not* on the offense which gave rise to the conviction, but rather on the training, disciplinary, or control needs of the individual, the facilities available in the institution, and the requirements for maintenance of order within federal prisons. Another change within the penal system involves penitentiary confinement. Likewise, this power has been shifted to the Attorney General although 18 U.S.C. §§4082-4083 provides that sentences of less than one year cannot be served in a penitentiary. Nonetheless, the distinction between particular types of penal institutions is less meaningful today than in the past.

In addition to the change in hard labor and lack of distinction between penitentiary confinement and confinement in other penal institutions, the court in *United States v. Neve, supra,* makes clear the most significant change in public opinion vis-a-vis infamous punishment is the concept of confinement itself. There is agreement today that *loss of liberty* is the most severe noncapital punishment available. This change in public attitude toward imprisonment itself — regardless of the conditions, duration, or name of the institution — is expressed in *Neve:*

> ". . . I am convinced that the present Supreme Court would be unlikely to attach to the label 'penitentiary' the decisive constitutional significance given that word in *Moreland, supra.* and earlier cases. *Gault* acknowledges that forced confinement is a serious loss, regardless of the nature of the confining institution." 357 F.Supp. at 3.

Based on this re-examination of infamous crimes considered in modern times and the recent decisions which urge further definition of this term, Petitioner respectfully submits the need to reconsider this claim that he is entitled to be proceeded against by indictment.

IV.

Numerous Infirmities and Omissions Regarding Constitutional Guarantees and Liberties With Reference to the Trial Proceeding and Appeal of This Matter Effectively Denied Petitioner Fundamental Fairness.

A. Intimidation of Witnesses

There is the fundamental premise that due process requires that a party have a right to present his own witnesses in establishing his defense. Where the prosecution or the trial judge exerts such duress upon the witness' mind by a fear of future prosecution as a result of his proffered testimony, the procedure precludes the witness' voluntary choice in determining whether or not he will testify and, if so, to what extent. The conduct of the trial judge and prosecution in the manner herein violates those standards applied by this Court in *Webb v. Texas,* 409 U.S. 95 (1972).

B. Court of Appeals Ignored Multiplicity Issue

Procedural due process requires that an opportunity be presented to be heard at a meaningful time and in a meaningful manner. Petitioner had a right to appeal his conviction to the Court of Appeals and have the substantial grounds he urged considered by that Court. Petitioner timely raised the issue of multiplicity in charging him and trying him on five informations for one offense. The government, at every stage of the appeal, acknowledged that in discussing and arguing the issue of multiplicity, it was responding to the issue as raised by Petitioner.

The Court of Appeals declined to consider the issue of multiplicity on the factually erroneous ground that it

had only been raised by the government. This ignores or misapplies this Court's criteria with respect to procedural due process at the appellate level, *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1963).

C. Court of Appeals Prematurely Issued Mandate

The circumstances surrounding the erroneous and premature issuance of the Court of Appeals' mandate raise an important issue in the administration of federal criminal justice regarding procedural due process and fundamental fairness. Subsequent to the Court of Appeals' affirmance of Petitioner's conviction, he timely filed a petition for rehearing. Under the provisions of Rule 41(a) of the Federal Rules of Appellate Procedure, the mandate is stayed until disposition of the motion and for seven(7) days thereafter if the motion is denied. The relevant language of Rule 41(a), Federal Rules of Appellate Procedure, is as follows:

> "The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order."

The Court of Appeals issued an order denying the petition for rehearing on September 20, 1979. Under the provisions of Rule 41(a), Federal Rules of Appellate Procedure, the Court of Appeals' mandate would not issue until September 27, 1979. Contrary to the provisions of Rule 41(a), Federal Rules of Appellate Procedure, the Clerk of the Court of Appeals issued the mandate on September 14, 1979, six (6) days before the Court of Appeals even denied the motion.

On September 24, 1979, the Clerk of the Court of Appeals was apprised of the error. The Clerk acknowledged the error and stated that he would cause the mandate to be recalled.

Subsequently, the Clerk of the Court of Appeals stated that because the petition for rehearing included a suggestion for rehearing en banc, the mandate was not stayed. The Clerk of the Court of Appeals wrote counsel for Petitioner a letter confirming the aforementioned statement and reason for premature issuance of the mandate.

Rule 35(b), Federal Rules of Appellate Procedure, provides that a party may make a suggestion for rehearing en banc; and Rule 35(c), Federal Rules of Appellate Procedure, provides that the suggestion for rehearing en banc, in order to be timely filed, must be included in a timely petition for rehearing, or it must be filed before the time for filing a petition for rehearing expires. While Rule 35(c) provides that the mere pendency of a petition for rehearing en banc does not stay the issuance of a mandate, clearly the inclusion of a suggestion of a rehearing en banc does not vitiate a timely filed petition for rehearing which does stay the mandate. If it were so, a party could suggest a rehearing en banc only at his own peril, since the stay given to such a party in Rule 41(a) Federal Rules of Appellate Procedure would be taken away by such a construction of Rule 35(c).

Neither the Federal Rules of Appellate Procedure nor the local Rules of the Court of Appeals expressly provides for the construction the Court of Appeals places on Rule 35(c) Federal Rules of Appellate Procedure. Further, such a construction is contrary to the way the Court of Appeals ordinarily looks at a suggestion en banc. The order entered by the Court of Appeals denying the

petition for rehearing is an excellent case in point. There the Court of Appeals clearly expresses in its order that regardless of how labeled, an en banc suggestion of any kind will be construed as a petition for rehearing. Thus, if the petition for rehearing, or whatever is regarded by the Court of Appeals as a petition for rehearing, is timely filed within the time prescribed by Rule 41(a) Federal Rules of Appellate Procedure then the stay of the mandate provided by Rule 41(a) takes effect.

Petitioner was entitled to a stay of the mandate under the Federal Rules of Appellate Procedure (Rule 41(a)) during the pendency of his petition for rehearing in the Court of Appeals and for seven (7) days after a denial thereof. Instead, the Clerk, without notice to counsel who filed the petition, issued the mandate six (6) days before the Court denied the petition. The result was that counsel remained ignorant of the mandate's issuance, time commenced to run for the filing of a petition for certiorari, and petitioner was obliged to surrender early, depriving counsel of his assistance in preparing the petition for a writ of certiorari. This procedure ignores procedural due process and misapplies this Court's standards in balancing speed and efficiency against an individual's rights.

Rule 35, Appellate Rules of Appellate Procedure, merely provides a means for suggesting that a rehearing en banc would be appropriate in a particular case. Parties are not to be penalized by losing a stay authorized by Rule 41(a), Federal Rules of Appellate Procedure, in making the suggestion. The construction of Rule 35(c), Federal Rules of Appellate Procedure, urged by the Court of Appeals in this case is contrary to and misapplies this Court's holding in *Western Pacific Railroad Corp. v. Western Pacific Railroad Company,* 345 U.S. 247 (1953).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: October 15, 1979

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1895

United States of America, Plaintiff-Appellee, v. Alton R. Moss a/k/a John L. "Snoopy" Freeman, Defendant-Appellant.	Appeal from the United States District Court for the District of Nebraska.

Submitted: June 12, 1979

Filed: August 16, 1979

Before HEANEY and STEPHENSON, Circuit Judges and MARKEY,* Chief Judge, United States Court of Customs and Patent Appeals.

MARKEY, Chief Judge.

Appeal from a jury conviction before Chief Judge Urbom of the United States District Court for the District of Nebraska, on charges of aiding and abetting the willful filing of fraudulent withholding forms by others. We affirm.

* HOWARD T. MARKEY, Chief Judge, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

Background

Defendant-appellant Alton Moss, also known as John L. Freeman (Freeman), travels throughout the United States giving a speech in which he challenges the constitutionality of the federal income tax laws and describes how to avoid the federal withholding tax.

Defendants Vanosdall, Gronewold, Lilienthal, Spencer, and Sanne (principal defendants) are employees of Van's Electric Company (Van's).

In late February 1978, Gronewold, Sanne, and Vanosdall heard Freeman in a radio interview. On March 8, Gronewold attended and recorded a speech given by Freeman at a local hotel. In mid-March, Gronewold played his recording for the principal defendants. On April 8, Freeman came to Van's and spoke to all the principal defendants except Spencer, and advised them that, were they to run afoul of the law, he would defend them for a stated fee.

Motivated by Freeman's speech, the principal defendants filed falsified W-4 forms. All were charged by information with violation of 26 U.S.C. § 7205 (§ 7205),[1]

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[1] §7205. Fraudulent withholding exemption certificate or failure to supply information.

Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both.

and pleaded guilty.[2] Each information also charged Freeman in a second count with violation of 18 U.S.C §2.[3]

During his arraignment, Freeman, acting *pro se,* asked that his case be submitted to a grand jury. When his request was denied, Freeman filed a corresponding motion, which was also denied.

Immediately prior to trial, Freeman moved for, *inter alia,* reduction of the charges to a single charge and dismissal on grounds of illegal selective prosecution. Those motions were denied.

The jury found Freeman guilty on all five counts. The court sentenced him on each count to the custody of the Attorney General for a period of one year, the sentences to run concurrently.

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[2] A sixth defendant, Boruch, also pleaded guilty, but later withdrew his plea and was acquitted. He did not take part in Freeman's trial, and the case against Freeman based on Count II of the information charging Boruch was dismissed.

[3] §2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Aiding the filing of fraudulent withholding forms is also a violation of 26 U.S.C. §7206(2):

§ 7206. Fraud and false statements

Any person who —

(2) Aid or assistance

Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Issues

The issues are whether: (1) Freeman's actions are protected by the first amendment, (2) an indictment is required to charge aiding and abetting in violation of 18 U.S.C. § 2, and (3) Freeman was illegally selectively prosecuted.[4]

1. Freeman's actions are not protected by the first Amendment.

Freeman alleges that his speeches "[challenge] the constitutionality of the income tax laws as . . . enforced in this country . . .," that he "espouses a political cause aimed at changing the tax law in the United States . . .," and that his actions were "absolutely protected" by the first amendment, any conviction founded on the present record being "outside the . . . perview of . . . the laws of this country."

Freeman's objection was answered by this court in *United States v. Buttorff,* 572 F.2d 619 (8th Cir. 1978), on facts similar to those here, 572 F.2d at 623-24:

> [T]he Supreme Court has distinguished between speech which merely advocates law violation and speech which incites imminent lawless activity. *See Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). The former is protected; the latter is not.
>
> Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.

[4] We decline comment on multiplicity of charges, a matter mentioned in the government's brief but neither raised nor argued by Freeman on appeal.

Freeman also alleges that his conviction must be overturned because §7205, on which it is based, is unconstitutionally vague.[5] *Gooding v. Wilson,* 405 U.S. 518 (1972), on which Freeman bases his argument, requires that the proscribed actions be constitutionally protected.[6]

[5] Freeman alleges: (1) that "criminal culpability based upon §7205 must rest on . . . the definition of 'liability' as . . . used on the W-4 forms . . . ," and that "the absence of a definition of 'liability' in the Internal Revenue Code invalidates the statute;" and (2) that the tax laws are vague because the same figures can be made to yield different results for tax liability. Both allegations are without merit:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954) (footnotes omitted). There is no doubt that the code sections named in the indictment proscribe the filing of a false or fraudulent withholding form and that defendants were capable of understanding this meaning of the statute.

United States v. Buttorff, 572 F.2d at 625.

[6] Freeman quotes from *Gooding,* 405 U.S. at 520-21. In pertinent part that quote reads:

> At least when statutes regulate or proscribe speech and when "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution," *Dombrowski v. Pfister,* 380 U.S. 479, 491 (1965), the transcendent value to all society of *constitutionally protected expression* is deemed to justify allowing "attacks on overly broad statutes with no re-

Because we find Freeman's actions not so protected, that argument is without merit.

2. An indictment was not required.

Freeman was charged by information. Fed. R. Crim. P. 7(a).[7] Because violation of §7205 is punishable by "a" prison sentence, and because under 18 U.S.C. §2 Freeman may be punished as a principal, he alleges that his crime was infamous. Hence, says Freeman, the government's failure to obtain a grand jury indictment was a violation of the fifth amendment's requirement therefor in relation to "capital or otherwise infamous" crimes.

An infamous crime is one punishable by death, or by imprisonment in a penitentiary or at hard labor. *United States v. Moreland,* 258 U.S. 433, 436-37 (1922); *Ex parte Wilson,* 114 U.S. 417, 426-29 (1885). Under 18 U.S.C. §4083: "Persons convicted of offenses against the United States . . . punishable by imprisonment for more than one year may be confined in any United States

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[6](continued)
quirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity," *id.,* at 486; see also *Baggett v. Bullitt,* 377 U.S. 360, 366 (1964); *Coates v. City of Cincinnati,* 402 U.S. 611, 616 (1971); *id.,* at 619-20 (White, J., dissenting); *United States v. Raines,* 362 U.S. 17, 21-22 (1960); *NAACP v. Button,* 371 U.S. 415, 433 (1963). [Emphasis added.]

[7] Rule 7. The Indictment and the Information

(a) Use of Indictment or Information

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

penitentiary. A sentence for an offense punishable by imprisonment for one year or less shall not be served in a penitentiary without the consent of the defendant." If punished as a principal under §7205, Freeman could not be imprisoned for more than one year. Because he could not therefore be required to serve his sentence in a penitentiary without his consent his crime cannot be deemed infamous[8] and an indictment was not required.[9]

3. Freeman was not illegally selectively prosecuted.

Freeman alleges that the government's only purpose in prosecuting the principal defendants was to enable the government to prosecute and "convict him for exercising his First Amendment rights," in violation of his rights to due process and equal protection set forth in the fifth and fourteenth amendments. He cites as evidence the guilty pleas of the principal defendants, their light sentences, their promises in writing to testify at Freeman's trial, and the acquittal of Boruch.

In *Oyler v. Boles,* 368 U.S. 448, 456 (1962), the Supreme Court stated:

> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

---

[8] For the same reasons, Fed. R. Crim. P. 7(a) does not, as Freeman alleges, violate the fifth amendment.

[9] That Freeman was charged with and convicted of five separate offenses with a possible total sentence of five years does not convert the offenses charged into "infamous" crimes for purposes of the fifth amendment. *United States v. Jordan,* 508 F.2d 750, 753 (7th Cir. 1975).

> Therefore grounds supporting a finding of a denial of equal protection were not alleged. *Oregon v. Hicks, supra; cf. Snowden v. Hughes,* 321 U.S. 1 (1944); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886) (by implication).

This court stated the test in *United States v. Catlett,* 584 F.2d 864, 866 (8th Cir. 1978):

> To establish the essential elements of a *prima facie* case of selective discrimination, a defendant must first demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. Second, the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his exercise of his first amendment right to free speech. *United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir. 1974). We approved of this two-pronged test of "intentional and purposeful discrimination" in *United States v. Swanson* 509 F.2d 1205, 1208-09 (8th Cir. 1975). *See also United States v. Ojala, supra,* 544 F.2d at 943.

Catlett involved a Quaker long active in protesting certain government policies by refusing to file federal income tax returns. Upon being prosecuted for willfully and knowingly failing to file income tax returns, Catlett produced evidence that the Internal Revenue Service had adopted a selective approach to its investigations of tax noncompliance, centering on "individuals who have achieved notoriety as tax protestors." 584 F.2d at 865-67. This court concluded, 584 F.2d at 867, that, even assuming the government's selective policy had been applied to Catlett, he had:

> [F]ailed to establish a *prima facie* case of purposeful discrimination. While the decision to prosecute an individual cannot be made in retaliation for his exercise of his first amendment right to protest government war and tax policies, the prosecution of those protestors who publicly and with attendant publicity assert an alleged personal privilege not to pay taxes as part of their protest is not selection on an impermissible basis.

Here, Freeman has not shown that he was (1) singled out for prosecution, or (2) selected for prosecution upon the impermissible ground of an exercise of his first amendment rights. "The prosecution of those who publicly and with attendant publicity [encourage people to file fraudulent withholding forms in violation of the law] as part of their protest is not selection on an impermissible basis." *Id.* at 867.

Finding no error, we affirm the judgment.

A true copy:

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHT CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 78-1895.

United States of America, Appellee, vs. Alton R. Moss, etc., Appellant.	Appeal from the United States District Court for the District of Nebraska.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

September 20, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert C. Tucker
CLERK

September 24, 1979

Mr. Leonard A. Tokus
502 East Willow Road
Milwaukee, Wisconsin 53217

Re: No. 78-1895 U.S.A. v. Alton R. Moss a/k/a John L. "Snoopy" Freeman.

Dear Sir:

This morning over the telephone we talked about the issuance of the mandate in this case. I indicated to you that the mandate had issued erroneously on September 14 and I would enter an order recalling it today. After talking to you on the telephone I examined the file and I find that the petition for rehearing contained suggestions for rehearing en banc. Under the circumstances the mandate correctly issued because, under the Federal Rules of Appellate Procedure, when suggestion for rehearing en banc is made in petition for rehearing the issuance of the mandate is not automatically stayed.

You may, of course, feel free to file a motion seeking recall of the previously issued mandate. It will submit any such motion to the Court.

Very truly yours,
/s/ Robert C. Tucker
Robert C. Tucker
Clerk

RCT/jel

cc: Hon. Edward G. Warin, U. S. Attorney, Attn. Richard J. Nolan, Asst. U. S. Attorney, Post Office Box 1228, Omaha, Nebraska 68102

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 78-1895.

United States of America, Appellee, vs. Alton R. Moss, etc., Appellant.	Appeal from the United States District Court for the District of Nebraska.

Appellant's motion to recall mandate and then grant stay of mandate has been considered by the Court and is denied.

September 27, 1979

APPENDIX E

STATUTORY MATERIALS

26 U.S.C. §7205.

Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both.

18 U.S.C. §2.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

No. 79-613

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALTON R. MOSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
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In the Supreme Court of the United States

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No. 79-613

ALTON R. MOSS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court issued no opinion. The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 604 F.2d 569.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1979 (Pet. 1). The court of appeals denied a petition for rehearing en banc on September

20, 1979. The petition for a writ of certiorari was filed on October 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction for aiding and abetting the filing of false withholding tax forms is barred by the First Amendment.

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted on five counts of aiding, abetting, counseling or inducing the filing of false withholding tax forms, in violation of 26 U.S.C. 7205. The district court imposed concurrent one-year sentences on each of the five counts. The court of appeals affirmed (Pet. App. 1a-9a).

The evidence adduced at trial may be summarized as follows: On March 8, 1978, petitioner conducted a meeting in Grand Island, Nebraska. At this meeting, petitioner delivered a speech in which he expressed his view that the income tax was unconstitutional and gave instructions as to how individuals could prevent the withholding of taxes from their wages by filing a form W-4 with their employer claiming large numbers of withholding allowances. Donald R. Gronewold, one of the principals later convicted for filing false withholding allowance certificates, attended this meeting and made a tape recording of petitioner's speech (Pet. App. 2a). Al-

though petitioner did not specifically request Gronewold to make the tape, he knew that Gronewold and others were recording his speech and approved of such recording (Tr. 162).

One or two days after the meeting, Gronewold played the tape recording of petitioner's speech for several of his co-workers at Van's Electric Company (Tr. 168). Within a few days, Gronewold and three co-workers filed false W-4 Forms (Tr. 170, 182, 188, 190, 227, 206-207). On April 8, 1978, petitioner visited Van's Electric Company and spoke with three individuals. He advised them that if they had legal problems with respect to the filing of the withholding allowance certificates he would defend them for a stated fee (Pet. App. 2a). While visiting Van's Electric Company, petitioner also spoke directly with the fifth principal, Shawn W. Sanne. He advised Sanne that he should file a Form W-4 claiming that he was exempt from withholding taxes (Tr. 265). Sanne thereafter filed such a form on April 10, 1978. Gronewold, Sanne, and their three co-workers were each convicted of filing a false W-4, in violation of 26 U.S.C. 7205.[1] All five principals testified that they would not have filed the false form in the absence of petitioner's advice (see note 2, *infra*).

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[1] This case therefore does not involve the question presented in *Standefer* v. *United States*, cert. granted, No. 79-383 (January 7, 1980), as to whether a defendant charged with aiding and abetting the commission of an offense may be convicted after the principal has been acquitted.

ARGUMENT

1. The court of appeals correctly upheld petitioner's conviction for aiding and abetting the filing of false withholding tax information.

The federal aiding and abetting statute, 18 U.S.C. 2(a), provides that "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." As this Court has held, a conviction under the statute requires that the accused " 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' " *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949), quoting from *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.).

While the defendant need not have a personal stake in the outcome of the criminal enterprise (*United States* v. *Harris*, 441 F.2d 1333 (10th Cir. 1971)), it is necessary that there be more than mere presence or acquiescence in the crime itself. *United States* v. *Kelton*, 446 F.2d 669 (8th Cir. 1971); *Baker* v. *United States*, 395 F.2d 368 (8th Cir. 1968). There must be a "purposive attitude" that facilitates the crime (*United States* v. *Peoni*, *supra*, 100 F.2d at 402), *i.e.*, some affirmative participation that at least encourages the principal. See, *e.g.*, *United States* v. *Thomas*, 469 F.2d 145, 147 (8th Cir. 1972), cert. denied, 410 U.S. 957 (1973); *United States* v. *Wiebold*, 507 F.2d 932, 934 (8th Cir. 1974); *United States* v. *Dickerson*, 508 F.2d 1216 (2d Cir. 1975); *United States* v. *Baumgarten*, 517 F.2d 1020 (8th Cir.), cert. denied, 423 U.S. 878 (1975).

Here, the record establishes that each principal received the information as to how to file the false form solely from the petitioner. Moreover, each principal testified that petitioner's statements were his only inducement to file the false forms.[2] Petitioner individually counselled one of the principals, Sanne, to file a fraudulent Form W-4. Finally, after the other principals filed the false forms, petitioner gave approval to their action and indicated that, for a fee, he would defend them in any ensuing legal action, styling himself a "constitutional lawyer." The court of appeals correctly concluded that there was ample evidence for the jury to conclude that petitioner was an active participant in the fraudulent withholding scheme. Accord: *United States* v. *Buttorff*, 572 F.2d 619 (8th Cir.), cert. denied, 437 U.S. 906 (1978).

Relying upon *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), petitioner argues that his conviction for aid-

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[2] Gronewold testified that petitioner's statements influenced him to file the false form, and instructed him how to do so (Tr. 163-164). He also testified that had he not heard petitioner's speech on tape, he would not have filed the false forms (Tr. 170), and that absent petitioner's instructions, he would have lacked the knowledge as to how to do so (Tr. 182). The other principals who heard the tape testified to the same effect. See testimony of Dennis G. Vanosdall (Tr. 190), Larry D. Spencer (Tr. 206-207, 210), and Robert L. Lillienthal (Tr. 227, 246, 255). The fifth principal, Shawn W. Sanne, did not hear the tape. However, petitioner specifically advised him to file the false form (Tr. 265), and Sanne would not have done so absent petitioner's advice (Tr. 267).

ing and abetting the filing of false withholding tax information is an impermissible violation of his First Amendment right to freedom of speech and expression. In *Brandenburg*, a unanimous Court struck down an Ohio statute that made criminal the advocacy of violence to achieve political reforms. The Court held that advocacy of violence or the joining with others to do so could not be proscribed "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (395 U.S. at 447). Accord: *Hess* v. *Indiana*, 414 U.S. 105, 108 (1973).

But in pointing out that the facts in this case are similar to those involved in its prior decision in *United States* v. *Buttorff*, *supra* (Pet. App. 4a-5a), the court of appeals recognized that petitioner's conduct went well beyond mere general advocacy of resistance to the internal revenue laws that might be protected by the First Amendment. While petitioner did not engage in "preparing a group for violent action and steeling it to such action" (*Noto* v. *United States*, 367 U.S. 290, 297-298 (1961)), he nevertheless advocated a specific course of lawless conduct by explaining how to avoid withholding taxes, under circumstances in which it was reasonably predictable that his counsel would imminently induce some of those whom he addressed to commit the offense of filing false withholding tax information. Unlike the state criminal syndicalism statute at issue in *Brandenburg*, which by its own terms and as applied punished mere advocacy and assembly with others, the decisions under

the federal aiding and abetting statute require that the defendant engage in some affirmative participation that encourages the commission of a substantive crime. The fact that petitioner's affirmative participation in and encouragement of the principals' criminal conduct took the form of speech does not entitle it to First Amendment protection where that speech communicated a blueprint for the commission of a crime and in fact induced the commission of that crime. See, *e.g.*, *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969); *Gara* v. *United States*, 178 F.2d 38, 41 (6th Cir. 1949); *Warren* v. *United States*, 177 F.2d 596 (10th Cir. 1949).

2. Petitioner also argues (Pet. 10-11) that the district court should have acceded to the jury's request for reinstruction rather than simply referring to its original instructions (Tr. 628). But petitioner did not raise this issue in the court of appeals, and, absent exceptional circumstances not present here, this Court should not review this contention. See *United States* v. *Lovasco*, 431 U.S. 783, 788, n.7 (1977); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

At all events, the decision whether to reinstruct the jury is within the discretion of the trial court. See, *e.g.*, *United States* v. *Wharton*, 433 F.2d 451 (D.C. Cir. 1970); *United States* v. *Toney*, 440 F.2d 590 (6th Cir. 1971); *Wilson* v. *United States*, 422 F.2d 1303 (9th Cir. 1970); *Batsell* v. *United States*, 403 F.2d 395 (8th Cir. 1968), cert. denied, 393 U.S. 1094 (1969); *Whitlock* v. *United States*, 429 F.2d 942 (10th Cir. 1970). Here, the jury requested fur-

ther instructions as to whether certain of petitioner's statements, suggesting that his listeners make their own legal decisions, would be sufficient to negate a finding of guilt if the acts actually occurred. But the district court had fully and correctly instructed the jury on all elements of the crime, including intent, willfulness and the law of aiding and abetting (Tr. 615-618). Accordingly, the trial court did not abuse its discretion in refusing to reinstruct the jury and in referring them instead to its original instructions.

3. Petitioner further contends (Pet. 12-14) that he was entitled under the Fifth Amendment to be prosecuted by indictment, rather than by information, as was the case here. Here, the crime with which petitioner was charged and convicted—aiding and abetting violations of Section 7205 of the Internal Revenue Code—was a misdemeanor. Since it is well settled under the decisions of this Court that a misdemeanor is not an "infamous" crime requiring indictment under the Constitution (*Duke* v. *United States*, 301 U.S. 492 (1937); see *United States* v. *Moreland*, 258 U.S. 433 (1922); *Ex parte Wilson*, 114 U.S. 417 (1885)), the government properly proceeded by information.

4. Petitioner also complains (Pet. 15) that the government used duress to gain testimony from its witnesses. Apart from his failure to raise this issue in the court of appeals, petitioner points to no evidence in the record to support his contention.

5. Finally, contrary to petitioner's argument (Pet. 15-16), the decision below correctly ruled (Pet. App. 4a n.4) that he had not raised the issue of multiplicity of charges in the court of appeals. In any event, the information did not charge a single offense in multiple counts. See *Gerberding* v. *United States*, 471 F.2d 55, 58 (8th Cir. 1973). Petitioner was prosecuted for aiding and abetting the submission of five separate false withholding allowance certificates by five separate individuals on several different occasions. At all events, petitioner suffered no harm from the alleged multiple charges because the district court imposed concurrent sentences on each of the five counts. *Benton* v. *Maryland*, 395 U.S. 784 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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Attorneys

JANUARY 1980

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